THE HIGH COURT OF SIKKIM : GANGTOK

REGULAR SECOND APPEAL NO. 1 OF 2006

1. State of Sikkim through
Secretary,
Urban Development & Housing Department,
Government of Sikkim, Gangtok.

2. The Town Planner
Urban Development & Housing Department,
Government of Sikkim, Namchi.

... (Defendants / Appellants) = Appellants

-VERSUS-

Smt. Shova Rai @ Wangdi,
Wife of Shri Sonam Wangdi
Resident of Namchi, South Sikkim.

... (Plaintiff / Respondent) = Respondent

(Against the Judgment and Decree dated 30.8.2005 passed by Shri B.C. Sharma, District Judge (South & West) Sikkim at Namchi in Title Appeal No. 2 of 2005 reversing the Judgment and Decree dated 24.2.2005 passed by Smt. K.C. Barfungpa, Senior Civil Judge, South Sikkim, Namchi in Title Suit No. 6 of 2004)

Lawyers for the Appellants: Sarvshri S.P. Wangdi, Advocate General, J.B. Pradhan and Karma Thinlay, Government Advocates.

Lawyers for the Respondent: Sarvshri A. Moulik, Senior Advocate and N.G. Sherpa, Advocate.

Present: Hon'ble the Chief Justice.

DATE OF HEARING & JUDGMENT: SEPTEMBER 12, 2006

JUDGMENT

B.K. Roy, CJ: This is Defendants' Second Appeal against the Appellate Decree, decreeing the Plaintiff/Respondent's suit on her appeal after its dismissal by the Trial Court.

[2] At the time of admission of this appeal following two substantial questions of law were formulated: -

"(1) Whether the First Appeal Court erred in law while interpreting the Judgment and Order of the High Court of Sikkim passed in Writ Petition Nos. 58 of 1999 and 1 of 2000, pertaining to affording of personal hearing or not?

(2) Whether the Judgment and Decree of the First Appellate Court suffer from illegality and impropriety?"

Firstly the background of the Suit in question: -

[3] Vide Order dated 27.09.2000 direction was made by this Court in a PIL Writ Petition No. 1 of 2000 that Government will decide whether the Lease Deed dated August 19, 1998 in respect of a site measuring 30' x 35' of Namchi Hatt Bazar in favour of the Respondent (who was Respondent No. 6 in the Writ Petition) and the allotment

made subsequently there to raising the total area of allotment to her to about 4050 sq. feet should be cancelled in view of provisions particularly Sections 5 and 6 of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 after giving an opportunity of hearing to the parties concerned clarifying that there shall be no bar to restore the site for its use as children park.

This direction was made after making of following observations: -

> "*43.* Thus, the writ petitions, counter-affidavits and the office files referred to in the earlier part of the judgment disclose a lamentable state of affairs showing nepotism and misuse and abuse of powers by the various authorities, besides failure on the part of the superior authorities to exercise proper check on their subordinate officers. Statutory provisions have been violated and no regard has been paid to the implementation of the Conduct Rules. Statutory provisions of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985, have been found violated, prima facie, as stated earlier. Since execution of the lease deed dated 19th August 1998 in favour of Mrs. Shova Rai was, prima facie, in violation of the statutory provisions contained in Sections 5 and 6 of Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985, and was based on misrepresentation of facts, it is a fit case where the Government should consider whether lease deed dated 19th August, 1998 and the subsequent allotments of Namchi land in her favour should be cancelled by having recourse to the provisions of Section 5(4) of the Act. Final decision, at this stage, is to be left to be taken by the Government,

after giving opportunity of hearing to the affected parties. ....."

[3.1] It is significant to note that the observations made by this Court in the aforementioned PIL Writ Petition were nullified by the Supreme Court in Special Leave Petition (Civil) No. 16951/2001 disposed of on 13.12.2002 in following words: -

> "The High Court on a Public Interest Litigation filed, made certain directions including for cancellation of the allotment ..... Now, it appears, from record, that pursuant to the said judgment which is impugned herein, ... proceedings for demolition have been initiated by the Government department. Learned counsel for the petitioner submits that his client would defend those proceedings but the apprehension of his client is that the observations made in the judgment may influence those proceedings and thus it may be clarified that the said proceedings would be decided on its own merits, uninfluenced by the observations made in the impugned judgment. The prayer made is just and fair. We, therefore, order accordingly. We clarify that in the decision .....the demolition proceedings or any other proceedings, which may be initiated pursuant to the impugned judgment, the observations made in the impugned judgment shall not be taken into consideration and such proceedings, shall be decided on their own merits. Further, if the petitioner has any right to challenge such proceedings, the said right would not be curtailed by any observations in the impugned judgment. Petitioner would be free to challenge those proceedings in accordance with law. The Special Leave Petition is accordingly disposed of in the above terms."

[3.2] The Authorities under the said Act passed orders dated July 7, 2001 canceling the allotment and the lease made in favour of the Respondent and ordered demolition of the constructions made on the land in question.

The filing of the instant Suit: -

[4] The Respondent filed the suit in question for declaration that the Orders dated July 7, 2001, the Lease Deed in regard to the lands in question) and the Order dated September 15, 2001 (issuing final demolition order) and the Order dated December 4, 2001 as illegal and unsustainable in law and having been passed without following the procedure prescribed by the law and as such not binding on her, which are liable to be cancelled; the Defendants and their sub-ordinate Officers be restrained from acting upon those Orders by granting permanent and mandatory injunction.

The Defence: -

[5] The main defence of the Appellants in the Suit was that the Orders in question were made after compliance of rules, it is denied that the orders are illegal and unsustainable; further orders were made pursuant to the earlier one, it is denied that they were made in abuse of power of the

Defendants and there was violation of principle of natural justice; the Plaintiff was given an opportunity to make her representation which she submitted and was considered.

The relevant Issues: -

[6] The Trial Court formulated in all six issues out of which issue nos. 4 and 5 were as follows, with which I am concerned in the Second Appeal: -

> "(iv) Whether the allotment orders of suit property dated 18.08.98, 29.10.98 and 12.07.99 are valid?
>
> (v) Whether the cancellation order dated 07.07.01, 15.09.01 and 04.12.01 in respect to suit property are illegal and liable to be cancelled?"

[7] Both parties led evidence, documentary and oral.

Dismissal of the Suit by the Trial Court: -

[8] The Trial Court dismissed the Suit observing and holding that the subsequent order of allotment in favour of the Plaintiff was not valid and a party would not be entitled to benefit and that the cancellation orders are found to be legally issued. The Trial Court also observed that the Plaintiff has admitted that she was given due opportunity to file show cause and of being heard

[9] The Plaintiff went up in appeal.

Decreetal of the Suit by the Appellate Court: -

[10] The Appellate Court reversed the dismissal of the suit and decreed it holding, inter alia, as follows: -

(i) From the letters and correspondences including the notice nothing can be seen that the authority had given chance to the Plaintiff to hear before cancellation of the Order;

(ii) Had the records of the concerned authority been produced to support their stand that the Plaintiff was given chance before issuance of the order dated 07.07.2001, the case would have been turned to different direction that notices were issued to her before taking action of demolishing the structure in addition to cancellation of site in question;

(iii) Orders/notice in question are declared to be unsustainable in the eye of law and the same stand cancelled;

(iv) The defendants are restrained from acting upon them and demolishing the structure without affording the Plaintiff an opportunity of being heard;

(v) The Defendants are not precluded from proceeding the matter further after following the procedures as per the direction of the High Court and by following the principles of natural justice.

[11] Admittedly the Judgment of this Court in the PIL Writ Petition was not filed as an Exhibit; nor was the Order of the Apex Court filed as Exhibit.

[12] At the request of the parties in the ends of justice many public documents including the Judgment and Order of this Court in the P.I.L. Writ Petition and of the Supreme Court have been taken in additional evidence.

[13] The moot question fell for determination by the Courts below was, and even before me is whether the principle of natural justice were violated by the Authority while exercising its jurisdiction under the provisions of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985?

The Submissions: -

[14] The learned Advocate General tried to convince me on the basis of the documents that the principles of natural justice were not violated by the Authority.

[15] Mr. A. Moulik, learned Senior Advocate appearing on behalf of the Respondent contended that the Appellate Court has reversed correctly the finding of fact in this regard but in the back drop that both sides have come up with documents which have been taken as additional evidence, justice requires remission of the case to the Appellate Court for their consideration as in Second Appeal this Court cannot record a finding of fact on the basis of such documents.

[16] The learned Advocate General in reply contended that justice requires consideration of the effect of the documents which have been brought on the record for the first time at the second appellate stage along with evidence which were led by the parties during Trial.

[17] Both learned counsel also point out today that the interest of justice requires remission of the Title appeal not before the First Appellate Court at Namchi, but at Gangtok.

My Findings: -

[18] I am of the view that having regard to the fact that a number of documents have been brought on the record for the first time before this Court in relation to the question as to whether reasonable opportunity of hearing was given or not to

the Plaintiff requires consideration by the First Appellate Court for recording a positive finding of fact.

The Result: -

[19] Accordingly, the Appellate Judgment and Decree under appeal are set aside and Title Appeal No. 2 of 2005 is remitted for its disposal to the Court of District Judge (East & North) at Gangtok.

[20] Cost will abide by the result of the appeal.

[21] The Office is directed to send back the records along with the documents which have been taken in additional evidence.

(Binod Kumar Roy)
Chief Justice